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EXAMINER

BEKKER, KELLY JO

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PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ADRIAAN CORNELIS KWELDAM

Appeal 2010-005191
Application 10/502,108
Technology Center 1700

Before ADRIENE LEPIANE HANLON, LINDA M. GAUDETTE, and
KAREN M. HASTINGS, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1, 2, 4-14, and 21-27, which are the only claims pending in this application. An oral hearing was held on March 23, 2011. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

Representative claim 1 reads as follows:

1. Method for the preparation of a meat substitute product which comprises protein, wherein:

- a) a protein material, alginate and water are combined,
- b) the composition from step a) is formed into a homogeneous mixture,
- c) the homogeneous mixture from b) is mixed with a solution of a metal cation with a valency of at least 2, in order to form a fibrous product,
- d) the fibrous product is isolated,

wherein the protein material comprises a milk protein material, and the homogeneous mixture of milk protein material, alginate, and water is formed in step b) in the presence of an amount of a calcium complex-forming agent.

Claims 1, 2, 4-14, and 23-27 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined prior art of Shenouda (US 4,423,083, issued December 27, 1983) and Monsanto (W0 96/13177, published May 9, 1996).

Claims 21 and 22 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined prior art of Shenouda, Monsanto, and Lusas (US 5,300,312, issued April 5, 1994).

OPINION

The Examiner bears the initial burden of presenting a *prima facie* case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

“[R]ejections on obviousness grounds cannot be sustained by mere

conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) *quoted with approval in KSR Int’l. Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

The fact finder must be aware “of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.” *KSR*, 550 U.S. at 421(citing *Graham v. John Deere Co.*, 383 U.S. 1, 36 (1966) (warning against a “temptation to read into the prior art the teachings of the invention in issue”)).

Applying the preceding legal principles with respect to obviousness to the factual findings in this record, we determine that the Examiner has not properly identified factual findings and reasoning for establishing a prima facie case of obviousness based on the applied prior art for the reasons explained by Appellant in the briefs (*see generally* App. Br.; Reply Br.).

Specifically, we agree with Appellant that, contrary to the Examiner’s position (Ans. 11), the broadest reasonable interpretation of claim 1 does indeed require that the fibrous product is formed when the homogenous mixture, including the calcium complex-forming agent, is mixed with the metal cation solution (Reply Br. 3; *see also* App. Br. 10; *see also e.g.*, Spec. 12:33-35 (“The solution used to form the fibres . . . is a solution of a metal cation with a valency of at least 2”); Spec. 13:13-15 (“The salt solution for the precipitation of the fibres . . .”)). Accordingly, the Examiner’s position is premised on an incorrect interpretation of the claim language. We also agree with Appellant that the deficiency of the Examiner’s obviousness conclusion is that the Examiner has not articulated any persuasive reason why the artisan would have modified the process of Shenouda to use the phosphate

sequestrant of Monsanto before the metal cation gelling step of Shenouda, nor how the proposed combination results in the claimed steps (*generally* App. Br.; Reply Br.; Ans.).¹

Under these circumstances, it is apparent that the only teaching or suggestion for combining the applied references in such a manner as to achieve the here claimed invention derives from the Appellant's own Specification rather than the applied prior art. Therefore, we conclude that the Examiner's rejection is improperly based upon improper hindsight reasoning. *See W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553, (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984) ("To imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.").

The Examiner has failed to demonstrate that the additional reference applied to claims 21 and 22 corrects the deficiency in the rejection of claim 1.

On this record, we cannot say the Examiner has established a *prima facie* case of obviousness within the meaning of 35 U.S.C. § 103(a) for the claims on appeal. For these reasons and those set out in the Briefs, we reverse the Examiner's § 103 rejections on appeal.

¹ Claims 23-25 are not drawn to the process of making a meat substitute, rather, they are drawn to the product of a meat substitute. However, the Examiner on this record has failed to provide *any* separate analysis of these product-by-process claims in relation to the applied prior art (Ans. *generally*). Because the Examiner has not set forth the necessary fact finding and reasoning to establish a *prima facie* case of obviousness as to the product-by-process claims, the rejection of these claims cannot be sustained.

CONCLUSION

In summary, the rejections before us on appeal are reversed.

REVERSED

kmm